STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
DISSENTING

RE: *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265

My colleagues and I agree that America's consumers expect that their mobile data services of today and tomorrow will work seamlessly wherever they go. Certainly it is important that all consumers, no matter where they live, work or travel, have the ability to benefit from the most advanced wireless services in a competitive market. I recognize and appreciate the complicated policy, legal and economic factors involved with the data roaming issue. I am grateful to the many proponents of today's rules for sharing their important insights and marketplace experiences with me. And, I also thank the Chairman for his diplomacy and graciousness in attempting to forge, in his view, a streamlined order that I know is motivated by the best of intentions. I am also grateful for the efforts of those companies that are continuing to reach roaming agreements, including for data services. The record reflects that numerous carriers seeking regulatory relief today have, in fact, struck many new deals.

I also agree with my colleagues that many benefits flow from the widespread availability of data roaming. Nonetheless, the Commission simply does not have the legal authority to adopt the regulatory regime mandated by this order. Accordingly, I regret that I cannot vote to approve today's order.

Even though the order attempts to explain otherwise, in mandating the provision of data roaming and establishing a means for dispute resolution that includes adjudicating terms and rates, my colleagues in the majority are, in essence, imposing a Title II common carrier regulatory regime in violation of Title III of the Communications Act and contrary to Commission precedent.

The effort to justify characterization of today's action as something other than a common carriage decision is understandable, for the law compels it. The problem, however, is that data roaming is what the law sees as a "private mobile service." In other words, the service is considered a "mobile service" under the Act, but not a "commercial mobile service or the functional equivalent of a commercial mobile service."[1] Because data roaming *is not* a commercial mobile service, Section 332(c)(2) of the Act prohibits the Commission from subjecting the provision of data roaming to common carrier regulation.[2] Under this rubric, the Commission in 2007 unanimously concluded that provision of wireless broadband Internet access service is an "information service" and that data roaming service must be "free from common carrier regulation."[3]

In establishing new regulations for roaming arrangements among commercial mobile data service providers, today's order goes to great lengths to argue that authority is pursuant to, and consistent with, Title III of the Communications Act. New rule Section 20.12(e)(1) states that a facilities-based provider of commercial mobile data services is required to offer roaming arrangements on "commercially reasonable" terms and conditions. The rule also provides that service providers will have discretion to negotiate on an individualized basis and may reasonably choose not to offer roaming arrangements in

[1] 47 U.S.C. §§ 153(33), 332(d)(3).

[2] 47 U.S.C. § 332(c)(2).

[3] *Appropriate Regulatory Treatment of Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5921 ¶ 54 (2007).

certain circumstances. The text of the order concludes that these mandates do not constitute common carriage because they do not employ Title II terminology explicitly. In other words, the order justifies its mandate by claiming that the new rules do not constitute common carriage because they do not employ the terms "just and reasonable" and "not unreasonably discriminatory," as found in Sections 201 and 202.[4]

What is perhaps even more difficult to reconcile with the pattern and structure of the Act, however, is the new rule that invites data roaming complaints through the Commission's formal and informal complaint procedures as set forth in Part 1 of the Commission's rules. The text states that, for the purpose of new Section 20.12(e), references to a "carrier" or "common carrier," as set forth in Part 1, will mean "a provider of commercial mobile data services" even though the order disclaims elsewhere any intent to turn these providers into common carriers. And the order expressly acknowledges that this adjudication procedure will involve Commission decisions on rates and terms.

The majority's efforts to legally justify the new regulations, no matter how well meaning, cannot survive dispassionate analysis. This decision embodies the hallmarks of classic common carriage: The regime compels the provision of service and restricts the discretion of providers to determine to whom – and on what rates and terms – to provide it. Indeed, the new rules constitute common carrier regulation by their very existence – in mandating the provision of a mere information service. Thus, when considered in their totality, these new mandates plainly *do* violate the Act and Commission precedent. We cannot evade the law by upending years of legal precedent and congressional intent to recast and redefine the meaning of common carriage.

Moreover, in crafting a new rule for complaints by bootstrapping on to the complaint procedures that pertain to common carriers, the majority eliminates all of the commercial flexibility granted to the providers. That the new rules allegedly permit providers to negotiate commercially reasonable terms and to offer different terms to different parties does not change the common carrier nature of these regulations. After all, this new standard and process must, by their very terms, involve the Commission in setting rates, and, by extension, terms and conditions – and to do so with reference to similarly situated common carriers. As a practical and legal matter, how else would "commercial reasonableness" be determined?

No matter how noble a policy goal may be, we have a steadfast obligation to respect the boundaries established by Congress through our authorizing statute. Appellate courts frequently remind us of this legal duty.[5] The new regulations adopted today are in direct conflict with the Act and Commission precedent. Therefore, I respectfully dissent.

In the meantime, I will continue to strongly encourage carriers to continue to enter into roaming agreements. I am confident that, as the 700 MHz band is built out, there will be new incentives to reach agreement, especially for agreements involving LTE technology. These market developments will surely foster new incentives for mutually beneficial roaming relationships.

[4] *See* 47 U.S.C. §§ 201-202.

[5] *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).